BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Summary of Argument.

The petitioner's first three points deal with the question of liability for the damage, as between ship-owner and charterer (pp. 19-30). The fourth and fifth points discuss the subject of assumption of risk by the shipper and the half damage rule in admiralty (pp. 31-35). The sixth point is concerned with the parol evidence rule, with particular reference to bills of lading (p. 36). The seventh point challenges the finding that an agreement to use tarpaulins was made (pp. 37, 38). The eighth point questions the holding as to negligence and the application of *Schnell* v. *The Vallescura* (pp. 39-41) and the last point emphasizes the general importance of the questions presented (pp. 42, 43).

POINT I.

The decision below, in holding the petitioner, as against Tampa Inter-Ocean, liable for all the damage, when both participated in the stowage of the cargo, is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *The Nidarholm*.

The District Court held that the petitioner's agents, through Hollaar, port captain at Rotterdam, and their stevedore, loaded this cargo and stowed it under the joint supervision of the ship's master and chief officer. It held further that the petitioner and Tampa Inter-Ocean were jointly

negligent in stowing the cargo and were jointly and severally liable to Pioneer for the damage to the cargo (R. 926, 927; see also Conclusion of Law No. IX, R. 946).

Finding of Fact No. 23 (R. 933, 934) reads in part as follows: "The stowage was laid out under the supervision of the Lafcomo's chief officer, Captain Wood."

Finding No. 59 (R. 943, 944) states that Hollaar, the petitioner's port captain, planned the loading and stowage of the cargo in co-operation with the master of the Lafcomo and his officers.

Finding No. 60 (R. 944) states that Hollaar advised the master and officers that the pips were to be stowed on the ship's fore deck and were not to be covered with tarpaulins; that he discussed with them all the details of the stowage and agreed with the master as to the manner of stowing the cargo.

Finding No. 64 (R. 944) states that the master and chief officer of the Lafcomo supervised the stowage of the cargo, together with the petitioner's port captain.

The Court's conclusions of law as to negligence were based upon three separate grounds; first, because the pips were stowed on the flat of the deck so close to the bulwarks as to obstruct some of the drainage apertures therein; second, because they were not covered with tarpaulins; and, third, because they were not stowed on the top of the Nos. 1 and 2 hatches (Conclusions Nos. VI, VII and VIII; R. 945, 946).

The Circuit Court of Appeals sustained all the foregoing findings and conclusions (R. 976-978).

Thus, although the ship-owner and the charterer were found to have been joint participants in the stowage and

to be jointly negligent therein, the entire loss was imposed upon the charterer (petitioner). This case therefore is in direct conflict with *The Nidarholm*, 34 Fed. (2d) 442 (C. C. A. 1); opinion on rehearing, 36 Fed. (2d) 227.

In *The Nidarholm* the charter was in the Government time form, as here, and provided that the charterer was to load, stow and trim the cargo at its expense, under the supervision of the captain. The charterer constructed a crib on the deck and piled up logs of pulpwood to a height of 17 feet. When the ship left her dock she had a starboard list, which later shifted to a port list. Shortly afterward the stanchions on both sides broke and the deck load above the rail fell into the sea. The charterer thereupon sued the ship to recover damages for the loss of the cargo.

The District Court, in *The Nidarholm*, 26 Fed. (2d) 92 (D. C. Me.), held for the charterer on the ground that the master supervised the loading and securing of the cargo and that the loss was due to the overloading of the ship with the deck cargo improperly stowed under the master's supervision.

The Circuit Court of Appeals held that the charterer's agent knew as well as the master that the cribbing would have to be strong enough to withstand the stresses produced by the vessel's heeling or rolling and in conclusion said (p. 443):

> "The construction of the cribbing was, taking the facts most favorably to the charterer, a joint undertaking carried out by the charterer and the vessel; for the failure of it each was at fault, and the loss should be divided."

This Court granted a writ of certiorari on the charterer's petition and affirmed the Circuit Court's decision.

Oxford Paper Co. v. *The Nidarholm*, 282 U. S. 681. Since the ship-owner did not ask for certiorari the Court was not called upon to decide the exact point now presented. But it was squarely before the Circuit Court.

There is nothing in the present record which makes the two decisions reconcilable. Clearly Hollaar's statement that the shipper's demand for tarpaulins had been withdrawn, even if unfounded, constitutes no adequate ground for imposing the entire loss on the petitioner. If the stowage issue had narrowed down to the simple point of using or not using tarpaulins the situation might be different. But it did not turn upon any such narrow question. As we have seen (*supra*, p. 20), the ship-owner and charterer were found jointly negligent on *three* grounds. And two of these three grounds were not concerned with the tarpaulin issue at all.

The District Court's holding (R. 920-922) that the carrier was at fault in failing to stow the pips on the tops of the hatches and in stowing them on the deck between the hatches and the bulwarks instead, had nothing to do with tarpaulins. Pioneer's own witnesses conceded that tarpaulins would not have been any protection for the pips when stowed on the deck plating. Claridge said that even if they had been surrounded by three or four thicknesses of tarpaulins they still would have been "thoroughly soaked" (R. 858, 859; see also Lynner, R. 256, 257). The carrier's experts said that tarpaulins would have been of no use in either place (Anderson, R. 413; Pilcher, R. 450, 451; Cocks, R. 357; Hollaar, Dir. Int. 19; R. 659, 660; Wood, R. 565, 566).

The Court's further holding (R. 920-922) that the goods were stowed so close to the bulwarks as to block off the drainage outlets partially, thereby preventing water from

clearing the decks readily and rendering the ship unseaworthy for the carriage of the pips, had no conceivable relation to tarpaulins. If the cases had been entirely enveloped in tarpaulins obviously the outlets in the bulwarks would still have been obstructed to the same extent.

Thus the petitioner was held finally liable for all the damage solely because of a statement of Hollaar about tarpaulins which related to but one of the three grounds on which the finding of joint negligence was based. At most it was but a contributing cause of the damage. *Oxford Paper Co.* v. *The Nidarholm, infra* (at p. 685).

We respectfully submit that a writ of certiorari should issue to reconcile this conflict between the First and Second Circuits.

POINT II.

The decision below, in holding the petitioner ultimately liable for the whole loss, notwithstanding the finding that the Lafcomo was unseaworthy with respect to the cargo as stowed, is in probable conflict with the decision of this Court in *Oxford Paper Co.* v. *The Nidarholm.*

The District Court held that the stowage of the cargo so as to block off part of the freeing ports, mooring rings and scuppers in the bulwarks, thereby making it impossible for the water to clear the decks readily, with the result that the lower tiers of the stow were periodically submerged in sea water, rendered the Lafcomo unseaworthy *quoad* the deck cargo (R. 920-922, 926; Conclusion of Law No. VI, R. 945).

The Circuit Court of Appeals, upholding the District Court's finding of negligence in the stowage of the cargo,

said (R. 978): "The ship was thus unseaworthy in respect to its carriage."

This Court, in *Oxford Paper Co.* v. *The Nidarholm*, 282 U. S. 681, said (p. 684):

> "By the terms of the charter party there was an affirmative warranty of seaworthiness on the part of the vessel which would otherwise have been implied. *The Caledonia*, 157 U. S. 124, 130, 131. This warranty extends to unseaworthiness of the ship due to faulty stowage of cargo, *Corsar* v. *Spreckles*, 141 Fed. 260, even though the charterer himself, subject to supervision of the captain, loads the vessel, *The Seguranca*, 250 Fed. 19. The charterer is entitled to rely on the master, in the exercise of his expert knowledge and judgment, to control the disposal of cargo so as to avoid dangers *to it* from any consequent unseaworthiness of the vessel." (Emphasis ours.)

It was argued there that the responsibility of the ship, when loaded by the charterer, is limited to faulty stowage which endangers the ship and that when the cargo alone is endangered the loss must be borne by the charterer.

This Court did not accept that view, saying (p. 684):

> "We are not aware of any case in which the rule thus broadly stated has been applied so as to relieve the ship from liability for damage to cargo exposed, by bad stowage, to sea perils peculiarly within the specialized knowledge and experience of the master."

Now certainly the stowing of these pips in such a way as to block off and obstruct part of the drainage outlets in the bulwarks was peculiarly the responsibility of the master. He was there with his chief officer supervising the stowage and it was incumbent upon him to see that the pips were not stowed so as to make the ship unseaworthy for their carriage.

The same is true of the stowage on the deck plating. Again the responsibility was upon the master, who was supposed to know whether or not the deck was a safer place to stow the pips than the tops of the hatches and to act accordingly. No matter what conversation Hollaar may have had with the master about the stowage the responsibility for seeing that the vessel was not made unseaworthy never left the master.

While this Court, in deciding *The Nidarholm* case, was not required to go beyond holding that the ship-owner was not liable for all the loss because the master was not under a duty to prevent the charterer from loading the pulpwood as it did, the opinion nevertheless states very clearly that the ship-owner cannot escape responsibility altogether as against the charterer if the ship is made unseaworthy as to the cargo by faulty stowage. Here the ship-owner, so far as the petitioner is concerned, was completely exonerated, in spite of the Lafcomo's unseaworthiness resulting from stowage which was under the active supervision of the ship's officers from beginning to end. The error in this holding seems manifest.

As to whether the owner or charterer of a ship under time charter has the duty of stowing the cargo, the rule in the Second Circuit has been that the duty is on the owner, in the absence of a contract or binding custom to the contrary, even though the work is done by stevedores employed and paid by the charterer. It was so decided in *Munson S. S. Line* v. *Glasgow Nav. Co. Limited,* 235 Fed. 64 (C. C. A. 2).

In *The Centurion,* 57 Fed. 412 (S. D. N. Y.), it was held that responsibility for stowage on a chartered ship may devolve upon the charterer if he undertakes to do the stowing. But there the cargo was stowed exclusively by serv-

ants of the charterer under the supervision of the charterer's super-cargo and the cargo which was damaged was stowed in the tween decks against the advice of the ship's officers.

In *The Kaupanger*, 241 Fed. 702 (S. D. N. Y.), Judge Learned Hand recognized the rule that a ship under time charter has the duty of loading and stowing the cargo but said that the duty could devolve upon the charterer by his assuming it. The charter there did not require the master to supervise the stowage and in fact it was in charge of the charterer's super-cargo. The Court held, however, that while the charterer had undertaken to stow the cargo it could impose that duty at any time upon the vessel and did so when the super-cargo asked the master whether the charterer could load a deck cargo and the master consented.

See also, *The Arnold Maersk*, 1924 A. M. C. 671 (S. D. N. Y.), and *Knohr & Burchard* v. *Pacific Creosoting Co.*, 181 Fed. 856 (W. D. Wash.).

We cannot see how Clause 8 of the present charter (*supra*, pp. 5, 6) would, even *prima facie*, transfer the duty of stowing from the owner to the charterer, where supervision of the stowage by the master was expressly reserved. However that may be, the active participation of the Lafcomo's officers in the stowage of these pips certainly reimposed the duty on the ship, even if it originally devolved upon the charterer under Clause 8. *The Kaupanger, supra.*

The case of *Canadian Transport Co., Ltd.* v. *Court Line, Ltd.* (1940), A. C. 934, a House of Lords decision, cited by the Court below (R. 978) as authority for holding the petitioner for the entire damage, actually supports our position. The case came before the Court of first instance on a special case stated by an arbitrator. The charter con-

tained a clause similar to present Clause 8. The ship-owner paid claims of cargo-owners based on improper stowage and obtained reimbursement from its indemnity association and the association, by right of subrogation, then proceeded against the charterer in the name of the ship-owner for indemnification.

The House of Lords, affirming the Court of Appeal, 64 Lloyds List Law Reports 57, held that under the naked clause the primary obligation of stowing the cargo was on the charterer. Lord WRIGHT pointed out, however (p. 942) that the arbitrator's award stated that no evidence had been produced by either party as to the loading or as to the extent, if any, to which there had been supervision by the captain, or whether there had been any protest or approval by him in respect of the stowage. He further said (p. 944) that "to the extent that the master exercises supervision and limits the charterer's control of the stowage, the charterer's liability will be limited in a corresponding degree." He then added (p. 945), "The master's power of supervision is obviously not limited to matters affecting seaworthiness."

The record here contains the evidence which was missing in the *Canadian Transport* case. Not only did the master and chief officer supervise the stowage (Finding No. 64, R. 944), but Hollaar and the chief officer exchanged expressions of approval thereof when the work was finished (Wood, R. 573, 574).

The case of *The Thomas P. Beal*, 11 Fed. (2d) 49 (C. C. A. 3), on which our opponents rely, is readily distinguishable from this case. (The writer was counsel for the cargo-owner there.) The steamer Thomas P. Beal was under time charter in the Government form. A shipment of barrels of perilla oil was stowed in the cross bunker next to

the engine room and the heat shrank the barrel staves, causing the oil to leak out. The charterer was held primarily liable. However, Clause 9 of the Beal charter, which corresponded with Clause 8 of this charter, did not provide that the stowage should be done by the charterer under the master's supervision (Beal Record, 873). The master and officers of the ship had nothing whatever to do with the stowage and the charterer, as the Court held (p. 53), assumed all responsibility therefor.

The decision of the Circuit Court here is, we believe, clearly contrary to the law as stated by this Court in *Oxford Paper Co.* v. *The Nidarholm, supra,* with respect to the responsibility of the ship-owner, as against the charterer, for damage to cargo resulting from unseaworthiness brought about by faulty stowage. We therefore respectfully submit that this decision should be reviewed on certiorari.

POINT III.

The decision below, in failing to hold Tampa Inter-Ocean ultimately liable for the whole loss, is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Seguranca.*

In *The Seguranca,* 250 Fed. 19 (C. C. A. 5), the charterers of the steamer Seguranca sued the vessel and her master to recover freight belonging to them which had been collected by the ship-owner from a consignee. The master claimed as an offset the expense of removing part of the cargo which was necessitated by allegedly improper loading of the vessel by the charterers' stevedores.

Clause 15 of the charter stated that the charterers or their agents should provide and pay a stevedore to stow

the cargo under the supervision of the master. The stevedore, Tracey, testified that the loading was done in a manner known to and approved by the master and that the additional cargo, which was the subject of the dispute, was loaded on the ship only after he advised the master of his intentions and that the master made no objection until after the cargo was loaded, when a list became apparent. The evidence was conflicting as to whether the admitted tenderness of the ship after she was loaded was due to improper stowage or to the crankiness of the ship.

The District Court concluded that any improper stowing of the cargo was due to the joint fault of the stevedore and the master and emphasized Clause 15 of the charter, which made it the master's duty to supervise the stowing.

The Circuit Court sustained the District Court's decision and refused to allow the master *any part* of the offset claimed. In other words, the Court placed *all* the liability on the ship as against the charterer.

The Circuit Court here, in requiring the petitioner to pay all Pioneer's damage in the final analysis, even went counter to its prior decision in *Olsen* v. *United States Shipping Co.*, 213 Fed. 18 (C. C. A. 2).

In the *Olsen* case the steamer Bergenhus, under time charter in the Government form, proceeded from Mobile to Gulfport to complete her loading. The charterer loaded timber on deck forward and aft. The after deck load was lashed by the crew but the forward deck load could not be lashed at that time because loading was not completed until after dark. The charterer was anxious to have the vessel leave for Ship Island, so the master backed the ship up preparatory to leaving, without lashing the forward deck load. The ship struck the side of the bank and some of the wooden uprights supporting the deck load were broken and

20 logs were thrown off. After a survey, 217 more logs were discharged and all the logs were rafted to Ship Island for reloading. When the vessel arrived at Ship Island her largest ballast tank could not be filled because of damages sustained while loading. She then had a list of about 14 degrees and the master refused to load the logs rafted from Gulfport. The charter insisted on a survey, however, and the surveyor said that the logs could be reloaded without affecting the steamer's seaworthiness. The master received them under protest. When the vessel left port her list increased to such an extent that part of the forward deck load of logs was jettisoned.

The Court held that the Bergenhus was unseaworthy on leaving Ship Island and that the jettison was necessitated by the ship's instability; that it was immaterial whether this was due to the amount or stowage of the deck load alone or in part to the impossibility of filling the ballast tank. The Court refused to impair the owner's implied warranty of seaworthiness by casting liability on the charterer. It emphasized that all matters pertaining to seaworthiness were under the master's absolute control; that it was his duty to see that they were right; and that he was not excused by the fact that the charterers did the loading and insisted upon his taking the deck load.

Had the lower Court followed its decision in the *Olsen* case, the very least it should have done here, in any aspect of the case, was to divide the loss equally between shipowner and charterer.

In view of the conflict of the decision below with the decision in *The Seguranca* and the lower Court's previous decision in *Olsen* v. *United States Shipping Co., supra,* we submit that a writ of certiorari should issue in order that the law on this subject may be settled by this Court.

POINT IV.

The Court below, in holding that Pioneer did not assume the risk of damage to the cargo solely through wetting by sea water shipped by the vessel, has either rendered a decision which is in probable conflict with the decisions of this Court in *Lawrence* v. *Minturn* and *The Delaware,* or has decided a novel question of federal law which should be finally settled by this Court.

We venture to say that this is the first case in the annals of the admiralty law in this country, with one lone exception, where a suit for damage to deck cargo has been based solely on its getting wet by the seas shipped by the vessel in rough weather. The only exception we know of is *The Carriso,* 30 Fed. (2d) 279 (C. C. A. 9). There the cargo-owner made claim for sea water damage to a shipment of cork board which was carried on deck. It was shown that cork board was susceptible to damage by salt water and it was contended that the carrier therefore acted wrongfully in placing it on deck under a general clause in the bill of lading authorizing the carriage of any cargo on deck. The carrier nevertheless was exonerated. The cargo-owner at least had a *prima facie* basis for a claim for it had made no specific agreement for deck stowage. Here there was a specific agreement.

The issues in deck cargo cases hitherto have revolved around such questions as unjustified jettison, overloading, and the improper securing of the cargo resulting in its coming adrift and being washed overboard or jettisoned. No such issues are involved here for the cargo was so well secured that none of the cases shifted or were lost overboard in spite of the heavy seas which came over the vessel (Finding No. 33; R. 937, 938). The loss was due

entirely to wetting by sea water. But the wetting of deck cargo by the seas has, up to this time, been considered one of the risks which the shipper assumes when he consents to deck stowage. As Anderson, one of the carrier's experts, succinctly put it, a shipper who asks that his cargo be stowed on deck, "must expect it to get wet in winter on the North Atlantic" (R. 442, 443; see also, R. 413).

As already stated, Pioneer was offered under deck stowage in the squares of the hatches of the Nos. 1 and 2 tween decks, but its agents refused to accept it (*supra*, pp. 4, 5). The witnesses for both sides agreed that the tween decks would have been a much safer place to stow the pips than on deck (G. Patterson, R. 126; Claridge, R. 860; Lynner, R. 263; Cocks, R. 351, 352).

Hollaar's suggestion that the pips be stowed in the tween decks was a wise one. In the absence of refrigeration it was the best compromise possible and the shipper should have accepted the offer. It was a practical certainty that the pips on a westbound Atlantic crossing in the winter were going to get wet on deck, whether covered with tarpaulins or not, and whether stowed on the deck plating or the hatch tops. Tarpaulins, aside from being positively detrimental to the pips from the standpoint of ventilation, which the shipper required, would have been wholly ineffectual as a protection from the elements (Cocks, R. 351; Anderson, R. 411-418; Pilcher, R. 450, 451; 453-455; Claridge, R. 858, 859; Lynner, R. 256, 257).

The petitioner contends that Pioneer, by insisting on deck stowage when it could have had stowage under deck, assumed the risk of the wetting of the cargo by sea water as one of the risks inherent in deck stowage. The goods did not get wet because of the absence of tarpaulins or because of their particular location on deck. They would

have been wet in any event. The case therefore seems clearly to fall within this Court's decisions in *Lawrence* v. *Minturn*, 17 How. 100, and *The Delaware*, 14 Wall. 579.

In *Lawrence* v. *Minturn* the libellant sued for the non-delivery of two boilers and chimneys which were carried on deck by agreement and were jettisoned during moderately rough weather. This Court held that there was no implied warranty by the ship-owner that the vessel should prove sufficiently buoyant to carry cargo placed on deck under such a contract. It found that the ship's inability to carry the articles arose solely from their position on deck and that the necessity for the jettison was not attributable to any want of due diligence and skill. While it thought that additional supports for the lower deck probably would have assisted the vessel in bearing the weight of the cargo, it did not believe that such supports would have enabled her to carry the unusual burden through a storm, and said that even if it had found negligence in this particular it could not declare that the loss was to be attributed to it.

In *The Delaware*, this Court, speaking of the carrier's responsibility as to deck cargo, said (p. 605):

> "Where goods are stowed under deck the carrier is bound to prove the casualty or *vis major*, which occasioned the loss or deterioration of the property which he undertook to transport and deliver in good condition to the consignee, and if he fails to do so the shipper or consignee, as a general rule, is entitled to his remedy for the non-delivery of the goods. No such consequences, however, follow if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea *or from the necessary exposure of the property*, * * *"
> (Emphasis ours.)

The question as to whether the shipper of deck cargo assumes the risk of its getting wet by sea water which comes over the ship's deck, has, we believe, either been determined in the petitioner's favor by the decisions in *Lawrence* v. *Minturn* and *The Delaware* or it is a new question for this Court. In either event we submit that a writ of certiorari should be issued to settle the question.

POINT V.

If the carrier was at fault in the stowage of the cargo, the shipper was also at fault in unnecessarily exposing its goods to the elements. The lower Court therefore erred in refusing to divide the damages equally between shipper and carrier.

The lower Court held that there was no basis for the application of the rule of divided damages as Pioneer was not at fault (R. 978). But if a shipper who insists on exposing goods such as lily of the valley pips on the open deck of a ship when he could have had them stowed under deck is not guilty of a negligent disregard of their safety we cannot imagine what would constitute negligence. In saying this we are assuming the correctness of the Court's holding that "salt water is obviously harmful to plant life."

The half damage rule has been applied by Courts of Admiralty in cases other than collision cases where mutual fault has been found.

In *The Max Morris* v. *Curry*, 137 U. S. 1 (11 Sup. Ct. Rep. 29), which involved injuries to a longshoreman partly through his fault and partly through that of the vessel, this Court divided the damages, holding that the rule is applicable to all cases of marine tort prosecuted in

admiralty as in harmony with the rule for the division of damages in collision cases.

In *The Georgian,* 4 Fed. Supp. 718 (S. D. Fla.) affirmed, *The Georgian,* 76 Fed. (2d) 550 (C. C. A. 5) the libellant, suing for damage to a refrigerated cargo of citrus fruit, charged that the temperatures were allowed to fluctuate beyond the agreed limits, thereby injuring the fruit. The respondent claimed that the fruit was injured by pre-shipment cleaning treatment, causing softening and decay. The Court found the damage attributable both to inherent vice and negligent refrigeration and divided the damages equally, by analogy to the collision rule.

In *Snow et al.* v. *Carruth et al.,* 22 Fed. Cases, 724 (No. 13,144) the same rule was applied where damage to cargo was due both to the fault of the cargo-owner and the carrier. This case was cited with approval by this Court in *The Max Morris* v. *Curry, supra.*

It was argued below that this is not a tort case. The allegations of the libel (R. 6-9), particularly the charge of negligence in Article Seventh, show, on the contrary, that the suit is founded in tort. The relationship of the parties of course arose out of a contract and their rights are measured by the terms of the bill of lading, but the action patently is one in tort. *Atlantic & P. Ry. Co.* v. *Laird,* 164 U. S. 393 (17 Sup. Ct. Rep. 120); see also, *The Pacific Spruce,* 1 Fed. Supp. 593 (W. D. Wash.).

Because this undoubtedly is a case where the damages should be divided between shipper and carrier, if there was fault on the part of the carrier, and because the Circuit Court's decision on this point probably is in conflict with *The Max Morris* v. *Curry, The Georgian,* and *Snow et al.* v. *Carruth et al.,* we respectfully ask that this question also be reviewed on certiorari.

POINT VI.

The Court below, in enforcing against the petitioner an alleged oral agreement to cover the goods with tarpaulins, which antedated the bill of lading and was not incorporated therein, has rendered a decision which is in conflict with the decisions of this Court in *The Delaware* and *The Thames*.

Pioneer relies on an alleged special oral agreement with the petitioner preceding the execution of the bill of lading, under which the pips were to be covered with tarpaulins. We submit that such agreement, if it ever existed, was merged in the bill of lading (Lib. Ex. 7, R. 878), which was silent about tarpaulins. Hence there was no basis for enforcing the alleged agreement against the petitioner.

In *The Delaware*, 14 Wall. 579, the bill of lading did not specify where the goods were to be stowed and accordingly it was held to be a contract for stowage under deck. The carrier offered evidence of an antecedent oral agreement that the goods were to be stowed on deck. This was held inadmissible as an attempt to contradict or vary the terms of the written contract (pp. 603, 604).

In *The Thames*, 14 Wall. 98, this Court said (p. 105): "The contract between the ship and the shipper is that which is contained in the bills of lading delivered."

As the holding of the Court below clearly is contrary to the decisions in *The Delaware* and *The Thames*, we submit that a writ of certiorari should issue to correct the error.

POINT VII.

The evidence does not support the findings of the lower Courts that an agreement to cover the goods with tarpaulins was made.

We are of course familiar with the rule frequently stated by this Court that concurrent findings of the lower Courts will not be disturbed unless plainly without support. But the finding that the petitioner agreed with the shipper to cover the cargo with tarpaulins flies so directly in the face of the bill of lading, which constituted the contract, as to be wholly without support, we believe.

In this connection may we recall this Court's decision in *Electric Storage Battery Co.* v. *Shimadzu,* 307 U. S. 5, a suit for patent infringement. There both lower Courts found that the Battery Company had not established two years prior public use of the invention (generally considered to be a question of fact) against Shimadzu. They held that use of the invention in the alleged infringer's plant was not a public use. This Court held that it was and the Circuit Court's decree in Shimadzu's favor was reversed.

The issue here is whether the shipper withdrew its request for tarpaulins on being advised that they would make ventilation of the pips impossible; something the shipper desired above everything else (Deuber, R. 300-306). Reference is made in our petition (pp. 4, 5) to the various telephone conversations at the time of the booking. We shall confine our discussion of this issue to two items of evidence.

Pioneer relies on a so-called loading permit prepared directly after the first telephone talk between Van Voort and Kruyne. It was not a loading permit at all as it was drawn up by the shipper's agents. It contained a notation supposedly that the pips were to be covered. It was prepared Saturday, November 25th, and was delivered to the stevedores on the afternoon of that day (Lib. Rotterdam Ex. A, R. 897; translation, R. 722).

The petitioner contends that after this so-called permit was prepared the shipper revoked the demand for tarpaulins and as conclusive evidence of this we point to the bill of lading (Lib. Ex. 7, R. 878) which was prepared *by the shipper's agents* on Sunday, November 26th, and which said nothing about tarpaulins. Only the stamped clauses were added by the petitioner's agents. It was then redelivered to the shipper and nothing further was heard about tarpaulins although the Lafcomo remained at Rotterdam for almost three days longer (Jahn, R. 584, 585).

Because of the shipper's deliberate omission of a provision for tarpaulins in the bill of lading, which was drawn up by its own agents the day following the final talk between Van Voort and Kruyne, the evidence assuredly is contrary to the finding that the shipper's demand for tarpaulins was not withdrawn. We therefore respectfully ask that this question also be reviewed on certiorari.

POINT VIII.

The lower Court erred in holding that the stowage was negligent and was the proximate cause of the loss and that the case, in any event, falls within the rule of *Schnell* v. *The Vallescura.*

This is the plainest sort of a case of lack of any causal relation between the alleged negligent stowage and damage to the cargo. Had the pips been stowed exactly as Pioneer now claims they should have been stowed, the shipment, if it had ever reached New York, which is doubtful, would have arrived badly damaged and depreciated in value through a variety of causes.

If the cargo had been stowed on the hatches it would have projected some eleven feet above the deck and three feet above the forecastle. It surely would have been hit by the seas coming from ahead and over the sides and with equal certainty would have been broken up and probably most of it washed overboard. Tarpaulins would have been useless as a protection as they would soon have been torn to pieces (Pilcher, R. 448-455; Anderson, R. 411-418; Cocks, R. 348-351). There admittedly were advantages and disadvantages both in the hatch tops and the deck plating as places of stowage. If on the hatches the stow would of course have been three feet above the deck but would have been in a more exposed position and infinitely more difficult to secure than when on the deck plating.

Surely it was error to hold the carrier negligent in the stowage when it was a question of balancing the advantages and disadvantages of the two places.

Again, the shipper was taking a tremendous risk in shipping the pips without refrigeration contrary to the universal practice. Without any tarpaulins at all around them, the pips, under temperatures averaging 52 degrees F., as they did on this voyage, would have sprouted even if they had not been damaged by sea water. Also, with the temperature above 50 degrees F. they would have generated heat and rotted in the middle. This was the testimony of Pioneer's principal Rotterdam witness, Jan Philippo, Jr. (Dir. Int. 5 (8); R. 590, 591; Cross Int. 10; R. 599). If the pips had been enveloped in tarpaulins they would have sprouted as if planted in a hot house (Kuer, R. 505). As sprouted pips their value would have been very small and it probably would have been necessary to dispose of them to street hawkers (Langeler, R. 487; Kuer, R. 504). The reason why the pips showed no sprouting on arrival was that the sea water had inhibited their growth and killed the cells in the roots (Lib. Ex. 12; R. 885, 886; Zimmerman, R. 209).

The lower Court, as one of the grounds for affirming the decree, said that the carrier "has not been able to prove what the damage would have been if proper stowage had been made," citing *Schnell* v. *The Vallescura*, 293 U. S. 296.

In *The Vallescura*, as the Court will recollect, the decay in the onions was due to two causes, one faulty ventilation, for which the carrier was liable, and the other sea peril, for which it was not liable. The carrier was not able to show how much of the decay was attributable to sea peril and consequently was held liable for all the loss. The basis of the decision, as we understand it, was that the carrier had the burden of bringing the damage within the exception of sea peril, within the rule of *The Folmina*,

212 U. S. 354, and had not sustained its burden because the shipper showed that the loss was due either to sea peril or negligence.

Here, however, we have a case involving deck cargo, where the carrier, as this Court pointed out in *The Delaware, supra,* does not have to prove a sea peril to secure exoneration. Pioneer not only took the risk of perils inherent in deck stowage, but the further risk of loss because of lack of refrigeration, which was a very serious risk. Therefore it was Pioneer's burden, we submit, to show that its goods would not have been damaged but for the carrier's negligence. It could not sustain this burden in the face of the damaging testimony of its own witness Philippo.

Furthermore, it is questionable whether the rule of *The Vallescura* has survived the Carriage of Goods by Sea Act, 46 U. S. C. A., §§ 1300 *et seq.,* adopted in 1936. Under that Act, as construed to date, the cargo-owner has the burden of proving that the unseaworthiness of the carrying vessel was the cause of his loss, even though the ship-owner may not have established that due diligence was used to make the ship seaworthy. *The Aakre,* 31 Fed. Supp. 8, 12 (S. D. N. Y.); affirmed, *The Aakre,* 122 Fed. (2d) 469 (C. C. A. 2); *The Temple Bar,* 45 Fed. Supp. 608, 613 (D. C. Md.). While the Act excludes deck cargo, the cargo-owner's burden as to deck cargo certainly cannot be less than in the case of under deck cargo.

Because it is certain that the pips would have been damaged no matter how they were stowed and because of the serious doubt as to the applicability of *Schnell* v. *The Vallescura,* we respectfully ask that the questions just discussed also be reviewed by this Court.

POINT IX.

The questions presented are of general interest and unusual importance.

This case brings up the question as to the responsibility for faulty stowage, as between the owner and time-charterer of a vessel, where the charter provides that the charterer shall stow the cargo under the master's supervision. It squarely presents the point, which this Court left open in *Oxford Paper Co.* v. *The Nidarholm*, as to whether the master's supervision is limited to stowage which endangers the ship or whether it includes stowage which imperils the cargo. It also involves the question of apportionment of liability between ship-owner and charterer, where both have participated in the stowage and have been found chargeable with faults which contributed to the damage to the cargo. These are all questions of the utmost importance, which it was not necessary for this Court to dispose of finally in *The Nidarholm*, because of the failure of the ship-owner there to ask for certiorari. Neither were they definitely settled by the House of Lords in *Canadian Transport Co. Ltd.* v. *Court Line, Ltd.* (*supra*, pp. 26, 27) for the evidence as to the owner's participation in the stowage, which this record contains, was lacking there.

This case also presents, for the first time, the question as to whether a shipper assumes the risk of damage to deck cargo solely through wetting by sea water shipped by the vessel, regardless of any finding of negligent stowage; also the question whether a shipper who insists on the stowage of vegetable cargo, susceptible to salt water damage, on a ship's deck in the winter-time, is guilty of fault justifying the application of the half-damage rule.

The question as to whether the parol evidence rule bars Pioneer from relying on the alleged oral agreement to cover the pips and the further question as to the applicability of *Schnell* v. *The Vallescura* to this case are fully deserving of consideration by this Court.

The question as to the propriety of the stowage and the factual question regarding tarpaulins, while undoubtedly lacking the general interest of the other questions, are important in this case and we respectfully ask that they be included in the review, if a writ of certiorari is granted.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, December 24, 1943.

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